

BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

RICHARD M. BUSH,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

FPAB NO. 05-005

ORDER GRANTING SUMMARY
JUDGMENT ON ISSUE NO. 1,
AND DENYING SUMMARY
JUDGMENT ON ISSUES NO. 2
AND 3

This matter comes before the Forest Practices Appeals Board (Board) on a Motion for Summary Judgment filed by Respondent Washington State Department of Natural Resources (DNR). Appellant Richard M. Bush is challenging DNR's approval of a forest practices application for a DNR timber sale in Clallam County. DNR is asking the Board to uphold the permit and dismiss this appeal on summary judgment.

The Board was comprised of Chair Tom P. May and Members Joel Rupley and John Giese. Administrative Appeals Judge, Kay M. Brown presided for the Board. Assistant Attorney General Edward D. Callow represented DNR- Regulatory. Assistant Attorney General Michael J. Rollinger represented DNR- Proprietary. Mr. Bush represented himself.

In rendering its decision, the Board considered the following submittals:

1. Richard Bush's Appeal;
2. DNR's Motion for Summary Judgment, Declaration of Mike Cronin with Exhibits 1 through 3, Declaration of Ross Goodwin with Exhibit 1, and Declaration of Charlie Cortelyou with Exhibits 1 and 2;

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3. Bush's Response, Declaration of Richard Bush and Enclosures 1 through 8;
4. Bush's Amendment to Response with substitute Enclosures;
5. DNR's Reply, and Second Declaration of Charlie Cortelyou.

Having fully considered the record in this case and being fully advised, the Board enters the following ruling.

Facts

On June 5, 2005, DNR approved Forest Practices Application No. 2606740 for a DNR timber sale referred to as the "Catamount" Timber Sale. The permit allows forest practices on four units totaling 154 acres located on State Trust Lands on the Miller Peninsula in Clallam County. FPA No. 2606740 was classified as a Class III forest practices, because none of the Class IV triggers were present on the application site.¹ *Cronin Decl. and Ex. 2; Goodwin Decl.; Cortelyou Decl.*

The Catamount Timber Sale was designed to be consistent with the State Habitat Conservation Plan (HCP). The HCP is an agreement between DNR and the U.S. Fish and Wildlife Service intended to allow land management activities while protecting threatened and endangered species. It requires legacy and reserve tree retention, harvest unit size and timing restrictions, and wetland and riparian buffers. *Cronin Decl. and Ex. 2.*

The DNR's decision to sale the timber was subject to SEPA review. A checklist was completed on February 8, 2005. On the checklist, the DNR indicated the presence of songbirds,

¹ The Appellant does not challenge this designation.

1 piliated woodpeckers, deer, bear, and mountain beaver. No unique habitats were designated.

2 *Cronin Decl. and Ex. 2(SEPA checklist, p. 10); Cortelyou Decl. and Ex. 2.*

3 The DNR issued a mitigated determination of non-significance (MDNS) on May 13,
4 2005, and it was circulated for comment along with the SEPA checklist and a copy of the
5 application. The Appellant was included on the mailing list for the SEPA documents. The DNR
6 did receive some comments as a result of its notice process, but none from the Washington
7 Department of Fish and Wildlife (WDFW). *Cronin Decl. and Ex. 2; Cortelyou Decl. and Ex. 2.*

8 Mr. Bush filed an appeal of the forest practices permit issued for the Catamount Timber
9 Sale on June 30, 2005. Mr. Bush lives adjacent to Unit 1 of the sale. His main concern is that
10 the harvest will harm wildlife. *Bush Decl.*

11 Three issues were identified in the pre-hearing order on this appeal:

- 12 1. Whether DNR's threshold determination (i.e. MDNS) was clearly erroneous
13 because of alleged impacts to wildlife?
- 14 2. Whether the DNR's approval and conditioning of FPA No. 2606740 was in
15 conformity with WAC 222-30-020(10)?
- 16 3. Whether FPA No. 2606740 is appropriately conditioned to protect wildlife?

17 DNR has moved for summary judgment on all three issues, arguing there are no
18 contested issues of material fact, and that it is entitled to summary judgment on all three issues as
19 a matter of law.

1 Analysis

2 A. Summary Judgment Standard

3 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
4 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
5 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
6 moving for summary judgment must show there are no genuine issues of material fact and the
7 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*
8 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment
9 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
10 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider
11 the material facts and all reasonable inferences therefrom in the light most favorable to the
12 nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If
13 the moving party is a respondent and meets this initial showing, then the inquiry shifts to the
14 party with the burden of proof at trial. If, at this point, the non-moving party fails to make a
15 showing sufficient to establish the existence of an element essential to that party's case, and on
16 which that party will bear the burden of proof at trial, then the trial court should grant the motion.
17 *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

18 B. SEPA Threshold Determination

19 The FPAB reviews the DNR's SEPA determination of nonsignificance under a "clearly
20 erroneous" legal standard. *Norway Hill Preservation and Protection Ass'n. v. King County*

1 *Council*, 87 Wn.2d 267, 272-274, 552 P.2d 674 (1976). “A finding is ‘clearly erroneous’ when
2 although there is evidence to support it, the reviewing court on the entire evidence is left with the
3 definite and firm conviction that a mistake has been committed.” *Murden Cove Preservation*
4 *Ass’n v. Kitsap County*, 41 Wn.App. 515, 523, 704 P.2d 1242 (1985).

5 Here, Mr. Bush contends that the DNR’s MDNS is clearly erroneous because it was
6 based on an inaccurate SEPA checklist. Specifically, he contends that several species of birds
7 and animals present on the site are not mentioned on the checklist including cougar, coyote,
8 raccoon, eagle, osprey, and ravens. Further, he argues that the timber sale does involve “unique
9 habitat” because of its location on the Miller Peninsula, which is bordered on three sides by salt
10 water, and which is bisected by a major highway. He contends that DNR should have indicated
11 this on the SEPA checklist. Mr. Bush also argues that the DNR used outdated exhibit material in
12 its SEPA review. Mr. Bush’s final concern with the SEPA process is that no comment was
13 received from the WDFW. In light of this lack of response, Mr. Bush argues that DNR should
14 have contacted WDFW directly.

15 DNR does not appear to contest the presence of the additional species on the site. Nor
16 does it contest the physical setting of the sale, or the fact that it did not receive any comments
17 from WDFW. DNR does assert that it used current photos in its SEPA process. *Second*
18 *Cortelyou Decl.* DNR’s primary response to Mr. Bush’s argument is from the DNR SEPA
19 responsible official, Charlie Cortelyou. Mr. Cortelyou states that he considered all of the
20 information submitted by Mr. Bush in response to the DNR’s motion, and that it does not change
21 his decision that the sale will not have the probability of significant impact to the environment.

1 *Second Cortelyou Declaration*. DNR further responds to Mr. Bush's argument regarding
2 WDFW's failure to comment on the SEPA that an agency's lack of comment during a SEPA
3 comment period is to be construed as a lack of objection to the environmental analysis. *See*
4 WAC 197-11-545.

5 While the Board has some concern over the shortcomings of the SEPA checklist, it
6 concludes that the overall SEPA environmental review process was credible. *See e.g. Brown v.*
7 *City of Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). Although the SEPA process would
8 have been stronger if a favorable comment had been received from WDFW, the Board concurs
9 with the DNR that as a legal matter DNR was entitled to conclude from WDFW's lack of
10 comment that it had no objection to DNR's environmental analysis. In light of the deference
11 given to the SEPA responsible official's decision, the Board concludes that the DNR's SEPA
12 decision was not clearly erroneous, and therefore summary judgment is appropriate on this issue.

13 C. Big Game Winter Range (WAC 222-30-020(10)(b))

14 Mr. Bush argues, in his appeal that the approved forest practice does not comply with
15 WAC 222-30-020(10). This rule states:

16 (10) Wildlife habitat. This subsection is designed to encourage timber harvest practices
17 that would protect wildlife habitats, provided, that such action shall not unreasonably
restrict landowners action without compensation.

18 . . .

19 (b) Harvesting methods and patterns in established big game winter ranges should be
designed to ensure adequate access routes and escape cover where practical.

20 (i) Where practical, cutting units should be designed to conform with topographical
features.

21 (ii) Where practical on established big game winter ranges, cutting units should be

1 dispersed over the area to provide cover, access for wildlife, and to increase edge effect.

2 Mr. Bush contends that the application, as approved, fails to comply with paragraph (b)
3 of this rule because it fails to provide adequate access routes and cover for wildlife. He explains
4 in his declaration that to access the greater Olympic Peninsula forest from Miller Peninsula
5 wildlife must cross Highway 101. Mr. Bush states that much of Highway 101 in this area is
6 surrounded by open areas. One exception exists in the vicinity of Unit 2, where there is tree
7 cover in the area south of the highway. This covered area, in combination with the coverage
8 currently provided by trees in Unit 2, provides a route for wildlife to cross the highway. Mr.
9 Bush believes that the proposed logging in Unit 2 will interfere with this access in violation of
10 WAC 222-30-020(10)(b).

11 DNR, in its motion, contends that this section of the rule does not apply to this
12 application because the application is not located in an area established as “big game winter
13 range.” Mr. Bush responds that, in fact, this is an area of big game winter range, because he and
14 his neighbors have seen cougar and bear in the area.

15 The phrase “big game winter ranges” is not defined in the forest practices rules, nor is the
16 method for establishing an area as a big game winter range outlined. Although DNR alludes in
17 its briefing to the idea that big game winter range must be established by WDFW, none of the
18 declarations or briefing submitted set out the process by which such an area is established.
19 Further, DNR offers no opinions from either WDFW, or individual wildlife biologists on the
20 merits of Mr. Bush’s concerns regarding access routes and escape covers. The Board believes
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1 that this type of testimony is necessary to resolve the questions about impact to wildlife
2 presented by the Catamount Timber Sale.

3 In light of Mr. Bush's first hand knowledge of the wildlife actually using the site, and
4 construing the evidence and material facts and all reasonable inferences therefrom in the light
5 most favorable to the nonmoving party, the Board concludes that there is an issue of fact
6 regarding whether this application is in a big game winter range area, and if so, whether the
7 harvest has been designed to ensure adequate wildlife routes and cover where practical. The
8 Board denies summary judgment to the DNR on this issue.

9 D. Material Damage to Wildlife

10 The third issue in this case involves Mr. Bush's contention that the application, as
11 approved, is not appropriately conditioned to prevent damage to wildlife. DNR, when approving
12 a forest practices application, has the authority to impose site specific conditions on the
13 application, even exceeding the forest practices rules, to ensure that the proposed forest practices
14 will not cause material damage to wildlife. *Long v. DNR, et. al.*, FPAB No. 94-5 (1994).

15 Here again, Mr. Bush's primary contention of damage turns on the potential for
16 restricting access for wildlife traveling from Miller Peninsula to the greater Olympic Peninsula.
17 The Board concludes that on this issue, like issue no. 2, there exists a disputed issue of material
18 fact. The Board denies summary judgment on this issue.

19 Based on the foregoing analysis, the Board enters the following
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1 ORDER

2 Summary judgment is granted to DNR on Issue no. 1, and the issue is dismissed.
3 Summary judgment is denied on Issues 2 and 3. These issues will proceed to hearing on
4 December 1 and 2, 2005, at the Board's office in Lacey, WA.

5 SO ORDERED this 1st day of November 2005.

6 **FOREST PRACTICES APPEALS BOARD**

7 Tom P. May, Chair

8 Joel Rupley, Member

9 John Giese, Member

10 Kay M. Brown
11 Administrative Appeals Judge, Presiding
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